

KENYA / JUDGMENT

Kilonzo v Republic [2023] KECA 1562 (KLR)

[2023] KECA 1562 (KLR)**COURT**

Court of Appeal

BEFORE

MS Asike-Makhandia, S ole Kantai, PM Gachoka

CASE / FILE NUMBER

Criminal Appeal 76 of 2021

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Kilonzo v Republic (Criminal Appeal 76 of 2021) [2023] KECA 1562 (KLR) (8 December 2023)
(Judgment)

Neutral citation:

[2023] KECA 1562 (KLR)

Republic of Kenya

In the Court of Appeal at Nairobi

Criminal Appeal 76 of 2021

MSA Makhandia, S ole Kantai & PM Gachoka, JJA

December 8, 2023

Between

Jeremiah Mutisya Kilonzo

Appellant

and

Republic

Respondent

(An appeal from the judgment of the High Court of Kenya at Makueni (Kariuki, J.) dated 11th
October, 2019 in HCCRA No. 25 of 2019

Criminal Appeal 25 of 2019

)

Judgment

1. Jeremiah Mutisya Kilonzo, the appellant, in an attempt to have a second bite at the cherry preferred this second appeal challenging initially his conviction and sentence for the offence of defilement. However, when the appeal came up for hearing, the appellant abandoned the appeal against conviction and elected to pursue the appeal on sentence only.

2. As already stated the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act, the particulars being that on 7th December 2016 within Makueni County intentionally caused his penis to penetrate the vagina of MM a girl aged 16 years. He also faced the alternative count of committing an indecent act with a child contrary to section 11 (1) of the same Statute, particulars being that on the same date and place he intentionally touched the vagina of MM a child aged 16 years. He pleaded not guilty to the charges and his trial ensued. He was eventually found guilty, convicted and sentenced to fifteen (15) years imprisonment for the offence of defilement.

3. Being aggrieved by the decision of the trial court, the appellant appealed to the High Court against the judgment citing 8 grounds of appeal which were duly considered, and at the end, the High Court dismissed the appeal in its entirety thereby provoking this second appeal.

4. Despite the appeal being on sentence only, it is necessary to contextualize it by stating facts albeit in an abridged form giving rise to the appeal as gleaned from the record. The complainant, PW1 was a student at a High School. In the year 2016, she met the appellant who was a boda boda rider. He asked for her hand in a relationship, of which she agreed to. They became lovers and in the process she became pregnant. The appellant thereafter persuaded her to abort the pregnancy and gave her drugs to take for that purpose. The abortion was successful. It was her testimony that they slept together many times but she did not inform anyone about their relationship until her father took her for a pregnancy test as required by the secondary school she had been admitted in form one. Upon determination that she was pregnant, she was taken to Kilome Police Station where she recorded her statement and was issued with a P3 form. Thereafter, she was taken again back to the hospital where she was treated and the P3 form filled. At the time of testifying, she was 17 years old having been born on 8th August 2000.

5. PW2, the mother to the complainant, stated that although she wanted to take her to school, her father, PW3, took her to the hospital first and it was discovered that she was pregnant. She confirmed that the complainant was born on 8th August 2000, and was aged 17 years at the time of testifying. She also stated that on 10th January 2017, she came back home and found the complainant feeling pain in the stomach and when she inquired, she was told by the complainant that the appellant had given her some drugs to take. She took her to hospital where the doctor confirmed that the pregnancy had been terminated. She stated that the complainant informed her that the pregnancy belonged to the appellant.

6.The evidence of PW2 was corroborated by that of her father, PW3 who testified that on 9th January 2017, he took the complainant to a Machakos clinic for medical tests prior to joining form one at a secondary school. The complainant was found to be pregnant and he was advised by the doctor to report the incident at Kilome Police Station. At the police station, he was referred to Kilungu Hospital where she was again confirmed to be pregnant but the pregnancy had been terminated.

7.PW4, P.C Florence Menza carried out investigations and preferred the charges against the appellant. It was her testimony that the complainant came with her father to report the case of defilement. She escorted the complainant to Kilungu Hospital where she was examined and found to be pregnant. That on 23rd January 2017, they went to the secondary school where they took the complainant to Machakos Level 5 Hospital whereby she was examined and it was noted that she had aborted the pregnancy. The P3 form was filled and the appellant was arrested and charged.

8.PW5, Eric Kasiamani, a clinical officer testified that he examined the complainant whom she found to have been pregnant but which had been terminated by way of abortion. He filled the P3 form, which he tendered in evidence.

9.Put on his defence, the appellant in a sworn defence denied committing the offence and alluded to the possibility that the case was a frame-up due to an existing grudge between the parties.

10.The appellant was nonetheless found guilty, convicted and sentenced as already stated.

11.The appellant has cited four grounds of appeal. However, it is not necessary to set them out verbatim save for the relevant ground that the sentence imposed was manifestly harsh and excessive, as it was the maximum under the Statute. Parties filed written submissions and when the appeal came up for hearing on July 26th, 2023, on a virtual platform, the appellant was in person while the ODDP was represented by Ms. Vistengwa, learned prosecution counsel.

12.The appellant maintained that the sentence imposed by the trial court and confirmed by the High Court was harsh and excessive. That he had served 5 years and had dependents including his wife and children who have all been affected by his conviction and sentence. He was a first offender and had been remorseful, had undergone rehabilitation while in prison and had a good reputation of a disciplined and hardworking inmate from the prison service. That whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided for under Article 28 of the Constitution. Finally, that the period he had been in remand custody during his trial was not considered during his sentencing in terms of section 333(2) of the Criminal Procedure Code.

13.The appellant relied on the case of *Dismas Wafula Kilwake v Republic* [2019] eKLR for the proposition that in appropriate cases, the court freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so

demand. That the trial court did not consider any of the mitigating factors proffered by the appellant when imposing the sentence. He submitted that the court be persuaded by the High Court case of *Yawa Nyale v Republic* [2018] eKLR, where discretionary sentencing was applied to sexual offenders as this was not a case where the appellant had brutalized the complainant.

14.The respondent in return, submitted that the sentence imposed was legal and thus, this Court had no basis to interfere with the same. That the appellant seeks to have the duration he had spent in custody while undergoing trial be considered, which was his legal entitlement, as under section 333 (2) of the Criminal Procedure Code, courts are required to consider the period the convict spent in remand custody during the trial. That the appellant was arrested on 25th January 2017 and convicted and sentenced on 11th October 2019 having spent a period of 2 years, 8 months and 15 days in remand custody during the pendency of his trial, which duration ought to have been considered, but was not during sentencing. The respondent was therefore not averse to this Court interfering with the sentence imposed to that limited extent.

15.Since the appellant is only appealing against the sentence, it is important to set out the circumstances under which an appellate court interferes with the sentence imposed by the trial court and confirmed by the first appellate court. The principles guiding interference with sentencing by the appellate court were properly set out in *S. v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.This Court further in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

16.In this case, the appellant was charged under section 8 (1) as read with section 8 (4) of the Sexual Offences Act. The said provision provides that:1.A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.(4)A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

17. We have considered the factors the trial court took into consideration in sentencing the appellant. The sentence was commensurate with what the law prescribes. The sentence was thus legal and we have no reason or basis to interfere.

18. However, as to the time the appellant had spent in custody not being factored in the sentence, we have looked at the judgment of the trial court and the High Court and it is clear that the same was not considered and factored in the sentence as required. Accordingly, we are satisfied that the exercise of discretion by the trial court on this account was vitiated by its failure to consider the time the appellant remained in remand custody during his trial as required by the provisions of section 333 (2) of the Criminal Procedure Code. See also the cases of Bethwel Wilson Kibor v Republic [2009] eKLR, Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR and the Judiciary Sentencing Policy Guidelines. The respondent has conceded to this omission on the part of the trial Court. This was a serious misdirection on the part of the trial court which calls for our interference. We note that since his arraignment in the trial court until his conviction and sentence, the appellant had spent a period of 2 years, 8 months, and 15 days in remand custody during the pendency of his trial.

19. In the premises, we allow the appeal against sentence, to the extent that the sentence shall run from 26th January 2017, when he was presented to the court and not from the date of conviction by the trial court. To that limited extent, the appeal on sentence succeeds.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023. ASIKE-
MAKHANDIA.....JUDGE OF APPEALS. OLE
KANTAI.....JUDGE OF APPEALM. GACHOKA CIArb.,
FCIArb.....JUDGE OF APPEALI certify that this is a true copy of the
original Signed DEPUTY REGISTRAR

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